Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CENTRAL CARTAGE CO.,

Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in not following precedents of the Fourth and Eighth Circuits and *dicta* of the Ninth Circuit and instead followed precedent from the Eleventh Circuit refusing jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order of a district court which denied Central Cartage's motion to compel arbitration.

LIST OF RESPONDENTS

Respondents, collectively styled "Funds", are: Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee, and Central States, Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee.

STATEMENT OF CORPORATE AFFILIATION

Pursuant to Rule 29.6, Central Cartage Co. submits that it is a wholly-owned subsidiary of CenTra, Inc. CenTra, Inc. has no parent company. Central Cartage Co. has no direct or indirect ownership interests in any other company except for wholly-owned subsidiaries.

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Central Cartage Co. ("Cartage" or "Petitioner") respectfully petitions this Court to issue a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered on May 28, 1996.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Illinois is set forth in Appendix A. The Judgment of the Court of Appeals is set forth in Appendix B. The Opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Appendix C, and is reported at Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996).

JURISDICTION

The Opinion and Judgment of the Seventh Circuit Court of Appeals dismissing the appeal of Central Cartage for lack of jurisdiction were entered on May 28, 1996.

On June 12, 1996, Central Cartage filed its Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari on the basis that: (i) there is a "reasonable probability" that four Justices of this Court would consider the issue presented herein sufficiently meritorious to grant certiorari; (ii) there is a "fair prospect" that a majority of this Court would conclude that the decision of the Seventh Circuit Court of Appeals was erroneous; (iii) irreparable harm will result from a denial of a stay; and (iv) a balancing of the equities regarding harm to the parties favored a stay.

On June 19, 1996, after consideration of the motion and of the response of Respondents herein, the Court of Appeals granted Central Cartage's motion and stayed issuance of its

mandate until this Court had the opportunity to grant a writ of certiorari. A copy of the Order is attached at Appendix D.

Jurisdiction in this Court is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The construction of 28 U.S.C. § 1292(a)(1) is primarily at issue in this case. A copy of that statute follows and is attached at Appendix E.

28 U.S.C. § 1292(a)(1) provides that:

> (a) the courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On February 7, 1994, the Funds filed suit against Central Transport Inc. ("Transport") and Petitioner Central Cartage Co. ("Central Cartage") for pension fund contributions pursuant to ERISA, 29 U.S.C. §1001 et seq. The Funds alleged that Transport and Central Cartage failed to make all required contributions "which the employee work history it reported to the Pension Funds revealed to be owed for the period of December 29, 1991 through January 31, 1994, and by failing to accurately and completely report the work history of all covered employees and pay contributions on their behalf."

Central Cartage and Transport are obligated to make payments to the Funds under the terms of a series of collective bargaining agreements entered into between the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT") and employer associations, which represent Central Cartage and Transport. The National Master Freight Agreement for the period of April 1, 1991 to March 31, 1994 ("NMFA") was the collective bargaining agreement in effect during the period from 1991 to 1994. IBT, its local unions and the various employers simultaneously entered into four separately negotiated supplemental agreements which became integral parts of the NMFA.

Article 54 of the supplemental agreement to which Central Cartage was a party entitled "Health and Welfare Benefits" and Article 55 entitled "Pension" set forth the employers' obligation to contribute to the Funds. Those Articles also establish the procedure to be followed in the event that the parties disagree concerning health and welfare or pension contributions:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union, or the Trustees [of the Funds]. (emphasis added).

On January 27, 1995, Central Cartage filed its Motion To Dismiss And Compel Alternative Dispute Resolution seeking to have the district court address the Funds' failure to exhaust their administrative remedies. Subsequent to the filing of the motion, the Funds voluntarily dismissed Transport as a defendant to this action.

In an opinion dated May 3, 1995, the district court denied Central Cartage's motion to dismiss and compel alternative dispute resolution. See Appendix A. The district court based such denial entirely on its conclusion that Central Cartage had waived its right to compel the Funds to submit their grievances to alternative dispute resolution by failing to bring its motion less than a year after the case was filed.

The district court accepted that Central Cartage's affirmative defenses, which stated that the Funds had not exhausted their administrative remedies, referred to the alternative dispute resolution provision in the applicable collective bargaining agreements. The district court, nonetheless, held that the case was governed by Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th

Cir. 1995) and that by participating in the lawsuit, conducting discovery and filing written status reports, Central Cartage had "waived any right it might have had to submit the dispute to the Conference Joint Area Committee".

After the district court entered its June 1, 1995 Order denying Central Cartage's motion for reconsideration, Central Cartage filed its Notice of Appeal on June 13, 1996 invoking the appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. §1292(a)(1) (as the orders served as an injunction against arbitration) and under 9 U.S.C. § 16 (as a denial of arbitration under the Federal Arbitration Act).[1]

On May 28, 1996, the Seventh Circuit Court of Appeals for the Seventh Circuit rendered its decision dismissing Central Cartage's appeal for lack of appellate jurisdiction in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988 (7th Cir. 1996). A copy of the Court of Appeals decision is attached at Appendix C.

On June 12, 1996, Central Cartage filed its motion with the Seventh Circuit Court of Appeals seeking a stay of the mandate which, pursuant to Fed. R. App. P. 40(a) and 41(a), was issued on June 18, 1996. Central Cartage requested that the Seventh Circuit Court of Appeals stay the issuance of its mandate pending the filing of and final action by this Court on this Petition for writ of certiorari. Central Cartage cited and analyzed the factors to be considered in granting such a stay set

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[1]The Seventh Circuit found that the Federal Arbitration Act does not apply to the case at bar. This Petition does not seek review of that issue and is limited to whether appellate jurisdiction exists under 28 U.S.C. § 1292(a)(1).

forth by this Court in Rostker v. Goldberg, 448 U.S. 1306 (1980) (Brennan, J. in chambers):

> 1. That there is a "reasonable probability" that four Justices would consider the issue sufficiently meritorious to grant certiorari.
>
> 2. That there is a "fair prospect" that a majority of the Court would conclude that the decision below on the merits was erroneous.
>
> 3. That irreparable harm would result from the denial of a stay.
>
> 4. That a balancing of the equities regarding harm to the parties favored a stay.

Rostker, 448 U.S. at 1306, 1308 (1980) (Brennan, J., in chambers). The Seventh Circuit also requires satisfaction of its Circuit Rule 41(a)(3) that the party seeking the stay make "[a] substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court."

On June 13, 1996, the Court of Appeals directed the Funds to file a response to the motion by June 17, 1996. On June 19, 1996, the Court of Appeals issued its order granting Central Cartage's motion. A copy of the Court of Appeals decision granting the stay is attached hereto at Appendix D.

REASONS FOR GRANTING THE WRIT

The granting of a writ of certiorari in this case is appropriate pursuant to Rule 10(a) of the Rules of this Court for the reason that a United States Court of Appeals has entered a decision in conflict with the decisions of three other United States Courts of Appeals on the same important matter.

Central Cartage seeks a writ of certiorari to determine whether the Courts of Appeals have jurisdiction under 28 U.S.C. § 1292(a)(1) to review the interlocutory decision of a district court denying a motion to compel arbitration. The Seventh Circuit held that it lacks jurisdiction to review the denial of an arbitration proceeding in accordance with a similar finding made by the Eleventh Circuit. The Fourth and Eighth Circuits have held just the opposite and exercise such jurisdiction. The Ninth Circuit suggested in *dicta* that jurisdiction may exist to review orders denying arbitration but not orders compelling arbitration. The Third Circuit finds jurisdiction when the only relief being sought is the arbitration itself, but no jurisdiction when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision.

This case further illustrates the split among the Circuits which developed since this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

28 U.S.C. §1292(a)(1) provides that:

> (a) the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges

> thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Central Cartage asserts that the Court of Appeals for the Seventh Circuit should have exercised its jurisdiction to review the district court's denial of Central Cartage's motion to compel arbitration in accordance with the precedents of the Fourth, Eighth and Ninth Circuits.

A.
A Split Of Authority Exists In The Circuits

The Seventh Circuit Court of Appeals itself recognized that its decision was in conflict with at least two and possibly three other circuit courts of appeals:

> . . . appellant urges us to follow two recent cases from the Fourth and Eighth Circuits holding that such orders [denying motions to compel arbitration] have the practical effect of refusing to grant an injunction. Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir. 1988) (holding that orders denying arbitration have an injunctive effect and serious consequences because they force parties to undergo the expense of trial before being able to appeal); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990) (same). See also Abernathy v. Southern California Edison, 885 F.2d 525, 527 n.9 (9th

> Cir. 1989) (holding that orders granting arbitration are not appealable, but observing that orders denying arbitration may come within the exception noted by Gulfstream and applied by the Fourth Circuit in Kansas Gas & Electric Co.).

Central States Pension Fund, 84 F.3d 988, 992; Appendix C, p.14a. The Court of Appeals specifically concluded that it would "decline to follow the Fourth and Eighth Circuits . . . ." but failed to offer any criticism of the reasoning of these decisions. Id.

The Seventh Circuit issued its order staying the issuance of its own mandate pending the filing of this Petition for certiorari.[2] In so doing, the Seventh Circuit again implicitly recognized that its denial of jurisdiction conflicted with recent decisions of the Fourth and Eighth Circuits, and with the Ninth Circuit's interpretation of the Gulfstream exception. Central States Pension Fund, 84 F.3d 988, 992; Appendix C, p. 14a. By staying its own mandate, the Seventh Circuit necessarily determined that there was a "fair prospect" that its decision was

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[2]A well recognized Supreme Court treatise characterized the task of the appellate lawyer seeking a stay of mandate from the Court of Appeals for the pendency of a Petition for Certiorari as follows:

> Counsel may . . . be faced with the anomalous task of persuading a court of appeals judge or panel, whose adverse ruling is the subject of the prospective petition for certiorari, that the issue involved is so substantial and the appellate ruling is so suspect that the Supreme Court is likely to grant review and perhaps reverse.

ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §17.12 (7th ed. 1993).

erroneous. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).[3]

In fact, the Seventh Circuit also necessarily determined under its Circuit Rule 41(a)(3) that Central Cartage had made "[a] substantial showing that the petition for certiorari which is being filed raises an important question meriting review by the Supreme Court."

B.
Appellate Rights Are Being Determined By The Geographic Location Of The Trial Proceedings

The decision of the Seventh Circuit denies Central Cartage the same rights of review that are granted to similarly situated appellants in other jurisdictions strictly based upon the geographic location of the action.

28 U.S.C. § 1292(a)(1) provides appellate courts with jurisdiction of appeals from interlocutory orders of the district courts of the United States "granting, continuing, modifying, refusing or dissolving injunctions." The Seventh Circuit nonetheless denied appellate jurisdiction to hear Central Cartage's appeal based upon a misconstruction of this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

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[3]The Seventh Circuit Court itself acknowledged in another case, United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993), that "[a] conflict among the circuits is an accepted basis for the granting of the writ of certiorari."

1. This Court Did Not Abrogate The Jurisdiction Of The Courts of Appeals Provided By Congress Under Section 1292(a)(1)

In Gulfstream, this Court held that "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." 485 U.S. 271, 279. The denial of a demand for arbitration deals with more than the mere conduct or progress of litigation before the district court. Moreover, this Court assured that interlocutory review was available where it was "truly needed":

> Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have "serious, perhaps irreparable consequences."

485 U.S. 271, 287-88 (citation omitted). If arbitration is denied and the district court proceeds to trial, the benefits of reduced costs and speedy resolution through arbitration will be irretrievably lost.[4]

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[4]Inefficient management of the court system is directly contradictory to why Supreme Court justices encourage arbitration in some cases. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (commenting that arbitration is not a "cure-all for the mushrooming caseloads of the courts, but [is] one example of a 'better way to do it.'"); William Rehnquist, *A Jurist's View of Arbitration*, 32 ARB. J. 1, 7 (1977) (stating that arbitration is an alternative to the costly and time consuming litigation process); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 474 n.7 (1988) (applying the Warren and Rehnquist articles).

2. Circuit Courts Of Appeals In Three Other Circuits Have Found Appellate Jurisdiction To Exist

The Courts of Appeals in the Fourth and Eighth Circuits have recently found that the Circuit Courts of Appeals have jurisdiction to review the decisions of their district courts in granting or denying arbitration. The Ninth Circuit has suggested in *dicta* that it has jurisdiction to review denials of arbitration by the district courts in its circuit. The Third Circuit exercises jurisdiction when the only relief being sought is the arbitration itself but does not exercise jurisdiction when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision.

A split in the Circuits has resulted through their differing interpretations and/or extensions of the decision of this Court in Gulfstream. In 1988, the Fourth Circuit commented at length about this Court overruling the Enelow-Ettelson doctrine. See J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 317-18 (4th Cir. 1988). In its evaluation, the Fourth Circuit noted that despite this Court overturning the Enelow-Ettelson doctrine, the doctrine was not intended to bar interlocutory appeals of orders granting or denying injunctions or those having serious or irreparable consequences. Id. The Fourth Circuit reaffirmed its belief that it has jurisdiction to review appeals of orders denying arbitration in Jeske v. Brooks, 875 F.2d 71 (4th Cir. 1989) (discussing its holding in J.J. Ryan and Kansas Gas & Electric).

The Opinion of the Seventh Circuit in the case at bar noted that the court was versed in the decisions of the Fourth Circuit rendered in Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420 (4th Cir. 1988) and of the Eighth Circuit rendered in Nordin v. Nutri/System, Inc., 897 F.2d 339

(8th Cir. 1990), which found jurisdiction under the same circumstances as the case at bar. Nonetheless, the Seventh Circuit chose to reject their conclusions and to rule just the opposite of the Fourth and Eighth Circuits.

In Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420, 422 (4th Cir. 1988), the Fourth Circuit held that a district court's order denying defendant's motion to compel arbitration was an appealable interlocutory order under Section 1292(a)(1). The Fourth Circuit noted that this Court's decision in Gulfstream did not prevent consideration of defendant's truly necessary appeal:

> We hold that orders denying arbitration do have an injunctive effect and have "serious, perhaps irreparable, consequence." The order is injunctive because it enjoins proceedings in another tribunal. It has serious consequences because of the "irreparable harm that exists when arbitration is denied ab initio. . . ." Taylor v. Nelson, 788 F.2d 220, 224 (4th Cir. 1986). If a party "must undergo the expense and delay of trial before being able to appeal, the advantages of arbitration -- speed and economy -- are lost forever." Alascom, Inc. v. ITT North Elec. Co., 727 F.2d 1419, 1422 (9th Cir. 1984).

Kansas Gas, 861 F.2d 420, 422. See also Peoples Sec. Life Ins. v. Monumental Life Ins., 867 F.2d 809, 811 (4th Cir. 1989) (appeal of order denying arbitration is an appeal of right under Section 1292(a)(1)).

The Eighth Circuit adopted the Fourth Circuit's reasoning in Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990). In Nordin, the defendant wanted to prevent

plaintiff, its former officer, from serving as an operational manager for a competitor in violation of his contractual obligation not to compete. Id. at 340-41. Defendant moved to compel plaintiff to submit to arbitration as provided in the parties' agreement. Id. at 341. The district court denied the motion and defendant appealed. Id.

The Eighth Circuit held that it had jurisdiction to consider defendant's appeal pursuant to Section 1292(a)(1). Id. at 342. The court explained that the denial of a motion to compel arbitration has an injunctive effect that "carries with it serious and perhaps irreparable consequences." Id. The court stated that a denial of a motion to compel arbitration "can only be effectively challenged on immediate appeal because the advantages of arbitration will be forever lost if the appeal is delayed." Id.

In Abernathy v. Southern California Edison, 885 F.2d 525 (9th Cir. 1989), the Ninth Circuit considered whether it had jurisdiction to review an order granting a stay of proceedings pending arbitration and an order compelling arbitration.[5] The Ninth Circuit in Abernathy noted in *dicta* that while an order granting arbitration was not appealable, an order denying arbitration may come within the exception noted by this Court in Gulfstream and applied by the Fourth Circuit in Kansas Gas & Electric Company.

The Third Circuit has also reviewed a matter dealing with an order staying proceedings and compelling arbitration.

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[5]The Ninth Circuit agreed with the First and Third Circuits concluding that orders compelling arbitration are not ordinarily appealable under Section 1292(a)(1). Abernathy, 885 F.2d 525, 528 *citing* VDA, DeFuertes v. Drexel, Burnham, Lambert, Inc., 855 F.2d 10, 11 (1st Cir. 1988); Zosky v. Boyer, 856 F.2d 554, 560-61 (3d Cir. 1988).

After finding that Section 1292(a)(1) did not apply, the court expressly noted that it was not deciding whether "an order denying a motion for arbitration is distinguishable for purposes of appealability from an order staying proceedings or compelling arbitration." Zosky v. Boyer, 856 F.2d 554, 561 n.9 (3d Cir. 1988).

3. The Court Of Appeals For The Seventh Circuit Agrees With The Position Taken By The Eleventh Circuit

The Eleventh Circuit in Administrative Management Services v. Royal American Managers, 854 F.2d 1272 (11th Cir. 1988), noted that the former Enelow-Ettelson doctrine required that the underlying action be one at law and the defense one at equity for appellate jurisdiction to be found under Section 1292(a)(1). The Eleventh Circuit then resurrected Enelow-Ettelson by concluding that Section 1292(a)(1) must not automatically provide jurisdiction or else the former Enelow-Ettelson doctrine would not have been so restrictive:

> It seems obvious that if orders granting or denying motions to compel arbitration were *per se* appealable as injunctions under § 1292(a)(1), it would have been unnecessary for the courts to go through the gyrations prescribed by the now defunct *Enelow-Ettelson* doctrine in order to assert jurisdiction.

Id. at 1279.

Even without regard to which approach is the correct interpretation of 28 U.S.C. § 1292(a)(1) and this Court's decision in Gulfstream, there can be little doubt that there are four separate and distinct positions[6] being taken among the Circuit Courts of Appeals:

1) Jurisdiction does not exist -- Seventh and Eleventh Circuits;

2) Jurisdiction exists -- Fourth and Eighth Circuits;

3) Jurisdiction may exist for review of orders denying arbitration but not for review of orders granting arbitration -- Ninth Circuit;

4) Jurisdiction exists when the only relief being sought is the arbitration itself, but jurisdiction does not exist when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision -- Third Circuit.

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[6]The Funds asserted in their "Response of Plaintiffs-Appellees to Motion for Stay of Mandate Pending Petition for Writ of Certiorari" that the First Circuit would find jurisdiction to hear Central Cartage's appeal, citing Tejidos de Coamo v. Internat'l Ladies Garment Worker's Union, 22 F.3d 8 (1st Cir. 1994), but that the Fifth Circuit would deny jurisdiction in accordance with Jolley v. Paine Webber Jackson & Curtis, Inc., 864 F.2d 402, 403 (5th Cir. 1989). Those cases actually dealt with whether the Courts of Appeals have jurisdiction under Section 1292(a)(1) to review district court refusals to stay legal proceedings while arbitration is pending, rather than whether jurisdiction lies to review denials of the right to arbitration itself.

Central Cartage submits that the Seventh Circuit should have followed the holdings in Kansas Gas & Elec. Co. v. Westinghouse Elec. Co., 861 F.2d 420 (4th Cir. 1988) and Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir. 1990) and the *dicta* of Abernathy v. Southern California Edison, 885 F.2d 525, 527 n.15 (9th Cir. 1989) by finding jurisdiction under Section 1292(a)(1) to review the denial of arbitration by the district court. See also id. at 527 n.9 (cited by the Seventh Circuit in its opinion in the case at bar).

Central Cartage's ability to assert its rights in a nonjudicial forum will be irretrievably lost if the Seventh Circuit's denial of jurisdiction stands. Although an order granting arbitration only delays a party's access to judicial remedies, the denial of arbitration means that arbitration is effectively lost.

This case presents a single issue appeal which assures that the jurisdictional issue will be reviewed if certiorari is granted. Central Cartage did not choose the federal district court as the forum for decision making; the Funds filed the case in federal court. Central Cartage did nothing to affirmatively suggest that it wanted to follow any procedure of decision making other than arbitration.

CONCLUSION

The Seventh Circuit Court of Appeals addressed whether appellate jurisdiction exists to review denials of arbitration. In so doing, the Seventh Circuit furthered the split in the circuits. The various circuits hold as follows:

1) Jurisdiction does not exist -- Seventh and Eleventh Circuits;

2) Jurisdiction exists -- Fourth and Eighth Circuits;

3) Jurisdiction may exist for review of orders denying arbitration but not for review of orders granting arbitration -- Ninth Circuit;

4) Jurisdiction exists when the only relief being sought is the arbitration itself, but jurisdiction does not exist when the trial court reasonably expects to issue orders in the future effectuating the arbitration decision -- Third Circuit.

The Petition presents a single issue appeal under a viable federal statute. The confusion among the circuits will only be resolved if this Court addresses whether the Circuit Courts of Appeals have jurisdiction to immediately review denials of arbitration and clarify the questions concerning jurisdiction that have developed in the aftermath of this Court's decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

Central Cartage respectfully requests that this Court grant Central Cartage's Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

Order of the United States District Court for the Northern District of Illinois, dated May 3, 1995

Appendix A

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge:	Elaine E. Bucklo
Case Number:	94 C 774
Date:	May 3, 1995
Case Title:	Central States, et al. v. Central Transport, et al.
Docket Entry:	For the reasons stated herein, defendant Central Cartage Co.'s motion to dismiss and compel alternative dispute resolution is denied. (30-1,2)

For further detail see order on the reverse of the original minute order form.

Notices mailed by judge's staff.

Number of Notices: 2

Appendix A

(Reserved for use by the Court)

ORDER

Defendant Central Cartage Co.'s motion to dismiss and compel alternative dispute resolution is denied. Defendant waived any right that it might have had to submit the dispute to the Conference Joint Area Committee for resolution by failing to invoke such a provision for nearly a year after this case was filed. During that time, defendant participated in this lawsuit, conducted discovery and filed two written status reports. This case is therefore governed by the Seventh Circuit's decision in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, No. 94-2872, 1995 WL 86415 (7th Cir. Mar. 3, 1995). Defendant's contention that this case is distinguishable on the ground that it preserved its right in its answer is rejected. In its answer, defendant raised 11 affirmative defenses. One was that plaintiffs had not exhausted their administrative remedies. Assuming this defense was even intended to refer to the issue raised by the present motion, defendant was obligated promptly to seek a stay or dismissal. I also reject defendant's contention that it did not have sufficient information to bring this motion earlier. In view of the continuing litigation between the parties, this contention is frivolous.

In view of my ruling on the issue of waiver, I have not addressed the additional reasons argued by plaintiff to preclude dismissal of this case as sought by defendant.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Date: May 3, 1995

APPENDIX B

Judgment of the United States Court of Appeals for the Seventh Circuit, dated May 28, 1996

Appendix B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Dated: May 28, 1996

BEFORE: **Honorable** JOHN L. COFFEY, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 95-2406

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee,
Plaintiffs - Appellees

v.

CENTRAL CARTAGE COMPANY, a Michigan corporation,
Defendant - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 94 C 774, Elaine E. Bucklo, Judge

The appeal is DISMISSED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

Opinion of the United States Court of Appeals for the Seventh Circuit, dated May 28, 1996

Appendix C

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, Central States, Southeast and Southwest Areas Health and Welfare Fund and Howard McDougall, Trustee,

Plaintiffs-Appellees,

v.

CENTRAL CARTAGE COMPANY, a Michigan Corporation, Defendant-Appellant.

No. 95-2406.

United States Court of Appeals,
Seventh Circuit.
Argued Jan. 3, 1996.
Decided May 28, 1996.

Before COFFEY, MANION and KANNE, Circuit Judges.

COFFEY, Circuit Judge.

Central States, Southeast and Southwest Areas Pension Fund (collectively the "Pension Fund") filed suit against Central Cartage Company pursuant to section 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1145, claiming that Central Cartage had failed to fulfill its contractual obligation to pay employer contributions to the plaintiffs' pension fund. Nearly a year after the suit was filed, Central Cartage moved to dismiss the case and compel alternative dispute resolution. The district court denied the motion, finding that Central Cartage had waived its rights to

arbitration or alternative dispute resolution. Central Cartage appeals; we dismiss for lack of appellate jurisdiction.

I. Background

Central Cartage is a Michigan corporation engaged in primarily local trucking. The company (along with other trucking companies) entered into a nationwide collective bargaining agreement (known as the National Master Freight Agreement, or "NMFA") with the International Brotherhood of Teamsters, spanning the period April 1, 1991 to March 31, 1994. Central Cartage also entered into a supplemental agreement with the Union specifically covering all "truck drivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers, and such other employees ... engaged in local pickup, delivery and assembling of freight."

The supplemental agreement contains a provision obligating Central Cartage to contribute to the Pension Funds for Central Cartage's employees. The agreement also provides for alternative dispute resolution:

> Disputes or questions of interpretation concerning the requirement to make contributions on behalf of particular employees or classifications of employees shall be submitted directly to the Conference Joint Area Committee by either the Employer, the Local Union, or the Trustees.

In February 1994, the Pension Funds filed suit against Central Cartage pursuant to the provisions of ERISA: The Pension Funds alleged that Central Cartage had intentionally misclassified certain employees as "casual" instead of "regular"

employees (which lowered the required level of contribution to the pension funds) and had failed to pay employer contributions owed to the Pension Fund on behalf of these employees.

In April 1994, Central Cartage answered the complaint, alleging eleven affirmative defenses, including the Pension Fund's failure to exhaust administrative remedies. In a status report to the district court in July 1994, Central Cartage noted an unresolved issue of whether the Pension Fund had failed to exhaust its administrative remedies.

In anticipation of trial the parties conducted discovery. Although the record is not clear whether discovery proceedings were completed, in January 1995, Central Cartage filed a motion in district court to dismiss the case and compel alternative dispute resolution, as provided for in the supplemental agreement to the collective bargaining agreement. The district court ruled that Central Cartage had waived its contractual right to any alternative dispute resolution because the company had failed to "promptly" invoke the provision in the agreement "until nearly a year after this case was filed," conducting discovery, and filing status reports. See Cabinetree of Wis. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390-91 (7th Cir.1995) (holding that failure of a party to promptly move for arbitration after litigation has been commenced against that party is presumptive evidence that it has waived any contractual right to arbitration). Central Cartage made a motion for reconsideration; the court denied it. Instead of proceeding to trial, Central Cartage appeals the decision of the district court denying its motion to dismiss the lawsuit and compel alternative dispute resolution.

II. Analysis

A threshold issue raised by the Pension Funds is our jurisdiction to review the appeal. Normally, only final judgments may be appealed. 28 U.S.C. § 1291; Carson v. American Brands, Inc., 450 U.S. 79, 83, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981). However, Central Cartage has asserted two grounds for appellate jurisdiction: 28 U.S.C. § 1292(a)(1) (jurisdiction to review certain interlocutory decisions) or in the alternative 9 U.S.C. § 16 (appellate jurisdiction under the Federal Arbitration Act). Each will be considered in turn.

A. Review of Interlocutory Decisions

Central Cartage asserts that the district court's action, denying the motion to compel arbitration, constituted in effect a refusal to order an injunction. Title 28 U.S.C. § 1292(a)(1) provides, with emphasis added:

> (a) [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

However, "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." Gulfstream Aerospace Corp.

v. Mayacamas Corp., 485 U.S. 271, 279, 108 S.Ct. 1133, 1138, 99 L.Ed.2d 296 (1988).

Historically, district court orders refusing to compel alternative dispute resolution (most commonly arbitration) could fall within the ambit of section 1292(a)(1) under one of two theories: the Enelow-Ettelson doctrine, or the rationalization that the order had the practical effect of ruling upon an injunction. See Matterhorn, Inc. v. NCR Corp., 727 F.2d 629, 630 (7th Cir.1984).

Initially arising from the old division between courts of law and courts of equity, the Enelow-Ettelson doctrine provided that an order staying legal proceedings (such as a suit for damages for a contract breach) in district court so as to rule upon an equitable defense (such as fraud in the formation of the contract) is analogous to an equity chancellor enjoining the proceedings before a law judge; thus orders refusing to stay the legal proceeding in favor of an equitable defense is analogous to an equity court's refusal to grant an injunction: which provides the grounds for appeal under § 1292(a)(1). Enelow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440 (1935); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188, 63 S.Ct. 163, 87 L.Ed. 176 (1942). Some courts reasoned that a district court's refusal to stay litigation in favor of arbitration is equivalent to a court of equity refusing to enjoin a legal proceeding; the refusal of the injunction thus provides a basis for appellate jurisdiction. See e.g. B & R Assoc. v. Dependable Ins. Co., 835 F.2d 526, 528 (4th Cir.1987) (citing cases). However, our court refused to extend the doctrine to include orders refusing to compel arbitration. Ohio-Sealy Mattress Mfg. Co. v. Duncan, 714 F.2d 740, 743 (7th Cir.1983), cert. denied, 464 U.S. 1044, 104 S.Ct. 712, 79 L.Ed.2d 176 (1984). The conflict over the application of the

doctrine was rendered moot by Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), which abolished the Enelow-Ettelson doctrine.

[3] Apart from the Enelow-Ettelson doctrine, appellate review of interlocutory orders may be obtained under § 1292(a)(1) if the order has both the effect of an injunction and has "serious, perhaps irreparable, consequences." Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 101 S.Ct. 993, 996-97, 67 L.Ed.2d 59 (1981) ("Unless a litigant can show that an interlocutory order of the district court might have a 'serious, perhaps irreparable, consequence,' and that the order can be effectively challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.").

However, this court has refused to extend this theory to orders refusing to stay or dismiss district court proceedings in favor of arbitration. Ohio- Sealy, 714 F.2d at 743 ("The effect of the order in this case [refusing to stay district court proceedings in favor of arbitration] was merely to determine in which forum the claims would be heard. Thus, because [the appellant] has failed to establish that the denial is likely to have 'serious, perhaps irreparable' consequences as required in Carson v. American Brands, Inc., 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1980), this order is non-appealable at this stage of the litigation."); Matterhorn, Inc. v. NCR Corp., 727 F.2d 629, 631 (7th Cir.1984) ("the denial of a motion to compel arbitration pending a trial on the existence of an arbitration agreement does not have serious or irreparable consequences."); Matterhorn, Inc. v. NCR Corp., 763 F.2d 866, 870 (7th Cir.1985) ("Despite its resemblance to a mandatory injunction, an order to arbitrate is assimilated rather to a procedural order, such as a discovery order. Hence making

or refusing to make such an order is not appealable under § 1292(a)(1).").

The appellant, Central Cartage, argues that Gulfstream altered the face of appellate jurisdiction and requires us to ignore our prior decisions and evaluate, on a clean slate, our jurisdiction to review interlocutory orders denying motions to compel arbitration. In support, the appellant urges us to follow two recent cases from the Fourth and Eighth Circuits holding that such orders have the practical effect of refusing to grant an injunction. Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp., 861 F.2d 420, 422 (4th Cir.1988) (holding that orders denying arbitration have an injunctive effect and serious consequences because they force parties to undergo the expense of trial before being able to appeal); Nordin v. Nutri/System, Inc., 897 F.2d 339 (8th Cir.1990) (same). See also Abernathy v. Southern California Edison, 885 F.2d 525, 527 n. 9 (9th Cir.1989) (holding that orders granting arbitration are not appealable, but observing that orders denying arbitration may come within the exception noted by Gulfstream and applied by the Fourth Circuit in Kansas Gas & Elec. Co.).

However, although Gulfstream overruled the Enelow-Ettelson doctrine, it specifically preserved the alternate route under 1292(a)(1), identified in our caselaw of Ohio-Sealy, Matterhorn et al. See Gulfstream, 485 U.S. at 287-88, 108 S.Ct. at 1142-43 ("Section 1292(a)(1) will, of course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequences.' ") (quoting Carson, 450 U.S. at 84, 101 S.Ct. at 996-97). Indeed, our court has recently noted and re-affirmed the analysis underlying Ohio-Sealy, refusing to treat the denial of a stay in favor of arbitration as an injunction:

> Searching for an injunction in orders controlling the progress of litigation has an artificial quality. Every decision to proceed or wait imposes costs, but none resolves the merits. If potential costs of procedural decisions make for appellate jurisdiction then many interlocutory orders are appealable--a step the Supreme Court has told us to resist. See Digital Equipment Corp. v. Desktop Direct, Inc., --- U.S. ----, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). Cf. In re Springfield, 818 F.2d 565 (7th Cir.1987) (order that imposes costs but does not affect ultimate disposition of the merits is not appealable as an "injunction"). It is, after all, established that the costs of litigation are not "irreparable injury." If a district court errs in conducting a lawsuit when a contract calls for arbitration, that mistake may be corrected on appeal from a final decision;....

Briggs & Stratton Corp. v. Local 232, 36 F.3d 712, 714 (7th Cir.1994) (internal citations omitted), cert. denied, --- U.S. ----, 115 S.Ct. 1998, 131 L.Ed.2d 1000 (1995).

Accordingly, we decline to follow the Fourth and Eighth Circuits and reaffirm our holding in Ohio-Sealy et al. As noted in Briggs & Stratton, litigation costs are not irreparable harm and appellants have failed to show that the district court's order has the practical effect of refusing to grant an injunction.[1]

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[1]Further, Central Cartage's own actions in delaying nearly a full year before filing its motion to compel arbitration tends to demonstrate that prompt arbitration was not of vital interest to Central Cartage. See South Bend

Appendix C

B. The Federal Arbitration Act

Central Cartage asserts, in the alternative, that the Federal Arbitration Act provides appellate jurisdiction to review the district court's denial of a motion to compel arbitration.[2]

In the wake of Gulfstream, in 1989, Congress amended the Arbitration Act, specifying which interlocutory orders concerning arbitration are appealable and which are not. Specifically, 9 U.S.C. s 16(a) provides in part:

> An appeal may be taken from--
>
> (1) an order--
>
> (A) refusing a stay of any action under section 3 of this title[3],

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Consumers Club, Inc. v. United Consumers Club, Inc., 742 F.2d 392, 394 (7th Cir.1984) ("[Appellant's] failure to promptly and actively seek injunctive relief 'is a good indication that the status quo can continue until the ultimate conclusion of the litigation without interlocutory appellate review.' ") (quoting Shirey v. Bensalem Township, 663 F.2d 472, 476 (3d Cir.1981)).

[2] The district court specifically refused to compel "alternative dispute resolution." We will assume for purposes of the following analysis that the contractual dispute mechanism specified in the collective bargaining agreement (referring disputes to a "Joint Area Committee" for final resolution) is "arbitration" within the meaning of the Arbitration Act.

[3] Section 3 of the Arbitration Act provides that if a dispute is "referable to arbitration under an agreement in writing" the court must "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

> (B) denying a petition under section 4 of this title to order arbitration to proceed[4].

Thus, under § 16(a)(1)(A) and (B), appellants argue, we may review the district court's denial of its motion to compel arbitration.

This argument is correct, with one major flaw: section 1 of the Arbitration Act specifically excludes coverage--including the jurisdiction rules of § 16--for "contracts of employment of seamen, railroad employees, or any other class of employees engaged in foreign or interstate commerce."

Although several circuits have interpreted the language of § 1 to preclude the application of the Arbitration Act to all collective bargaining agreements, see e.g. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Pennsylvania Greyhound Lines, Inc., 192 F.2d 310 (3d Cir.1951); United Elec., Radio & Mach. Workers v. Miller Metal Prod., Inc., 215 F.2d 221 (4th Cir.1954), our circuit has limited § 1 to the transportation industries. Briggs & Stratton, 36 F.3d at 714-15 (citing Pietro Scalzitti Co. v. Operating Engineers, 351 F.2d 576, 579-80 (7th Cir.1965)). See also Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 53 n. 3 (7th Cir.1995) ("The Seventh Circuit, however, has held that this [sec. 1] exclusion is limited to transportation workers, or in other words, workers actually engaged in the movement of goods in interstate commerce...."); Miller Brewing Co. v. Brewery Workers Local

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[4] Section 4 of the Act states that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement."

Union No. 9, 739 F.2d 1159, 1162 (7th Cir.1984). Thus, for disputes involving collective bargaining agreements covering transportation workers, the Arbitration Act does not provide jurisdiction for interlocutory appeals from a district court's denial of a motion to compel arbitration. Briggs & Stratton, 36 F.3d at 714-15[5].

The appellant, Central Cartage, is primarily engaged in local trucking and occasionally transports cartage across state lines. We hold that the workers of Central Cartage (covered in the collective bargaining agreement at issue between Central Cartage and the Pension Fund) therefore qualify as "transportation" workers. Because the Arbitration Act does not apply to "transportation" workers, see § 1, Central Cartage's NMFA (the collective bargaining agreement) for its workers is not covered by the Act. Thus the jurisdictional provisions of § 16 of the Act are not applicable to Central Cartage's appeal.

III. Conclusion

The appeal is dismissed for lack of appellate jurisdiction.

---

[5] The Pension Fund has asked us to overturn Pietro Scalzitti and to hold that § 1 of the Arbitration Act excludes coverage for all collective bargaining agreements and not just those involving transportation workers. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n. 2, 111 S.Ct. 1647, 1651 n. 2, 114 L.Ed.2d 26 (1991), noted the issue but declined to resolve it. The question of overruling Pietro Scalzitti and its progeny was presented to this court in Matthews, 72 F.3d at 53 n. 3, but we saw "no reason to overturn these well-established precedents." Id. Following Matthews, we similarly decline to apply the s 1 exclusion to all collective bargaining agreements.

APPENDIX D

Order of the United States Court of Appeals for the Seventh Circuit granting Motion For Stay Of Mandate Pending Petition For Writ Of Certiorari, dated June 19, 1996

Appendix D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 19, 1996

Before

Hon. JOHN L. COFFEY, Circuit Judge

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND and HOWARD MCDOUGALL, Trustee, Plaintiffs-Appellees,	]	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 95-2406 v.	]	No. 94 C 774
CENTRAL CARTAGE COMPANY, a Michigan corporation, Defendant-Appellant.	]	Elaine E. Bucklo, Judge.

The following are before the Court:

1. **MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF**

CERTIORARI, filed on June 12, 1996, by counsel for the appellant.

2. **RESPONSE OF PLAINTIFFS-APPELLEES TO MOTION FOR STAY OF MANDATE PENDING PETITION FOR WRIT OF CERTIORARI**, filed on June 17, 1996, by counsel.

IT IS ORDERED that #1 is **GRANTED** and the mandate is **STAYED**. If the Supreme Court denies Central Cartage's Petition for a Writ of Certiorari, the mandate shall issue forthwith.

APPENDIX E

28 U.S.C. § 1292(a)(1)

(a) the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.